

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CHRISTOPHER CHARLES CLARK,

Plaintiff,

v.

FIDEL GUTIERREZ, *et al.*,

Defendants.

Case No. 1:21-cv-01386-JLT-EPG (PC)

FINDINGS AND RECOMMENDATIONS
RECOMMENDING THAT: 1) THIS CASE BE
DISMISSED, WITHOUT PREJUDICE, FOR
PLAINTIFF'S FAILURE TO COMPLY WITH
A COURT ORDER AND TO PROSECUTE
THIS CASE; AND 2) ALL OUTSTANDING
MOTION(S) BE DENIED AS MOOT

(ECF No. 33).

OBJECTIONS, IF ANY, DUE WITHIN
FOURTEEN DAYS

Plaintiff Christopher Charles Clark ("Plaintiff") is a state prisoner proceeding pro se and *in forma pauperis* in this civil rights action filed pursuant to 42 U.S.C. § 1983. This action proceeds on Plaintiff's Eighth Amendment claims against Defendants Garza, Carolina, Espitia, Aguilar, Oehlert, Nitescu, Jane Doe (a TTA), and Rizk for deliberate indifference to his serious medical needs; Plaintiff's California Gov't Code Section 845.6 claims against Defendants Garza, Carolina, Espitia, Aguilar, Oehlert, and Nitescu; Plaintiff's negligence claims against Defendants Shirley, White, Cronjager, Thomas, Gutierrez, Doe 1 (a contractor supervisor), and Doe 2 (a contractor); and Plaintiff's medical negligence claims against Defendants Jane Doe (a TTA) and

1 Rizk. (ECF Nos. 13, 15, & 18). Plaintiff's complaint generally alleges that Plaintiff tripped and
2 fell, and that he did not receive necessary medical care afterwards, and that grievance coordinators
3 intentionally interfered with his right to file a grievance. (*See* ECF No. 13).

4 On April 10, 2023, Defendants Shirley, Espitia, Oehlert, Cronjager, Nitescu, Aguilar,
5 Gutierrez, Thomas, Rizk, Carolina, Garza and White filed a motion for summary judgment. (ECF
6 No. 33). Defendants filed an amended notice and motion on April 13, 2023. (ECF No. 39).
7 Defendants argue they are entitled to summary adjudication because Plaintiff failed to exhaust
8 available administrative remedies on his claims as required by the Prison Litigation Reform Act
9 (PLRA) and applicable California state law. (ECF Nos. 33, 39).

10 Plaintiff was required to file an opposition or a statement of non-opposition to the motion
11 within twenty-one days, *see* Local Rule 230(l), but did not do so. On May 23, 2023, the Court
12 ordered Plaintiff to file an opposition or a statement of non-opposition within thirty days. (ECF
13 No. 45). The Court warned Plaintiff that if he failed to respond to Defendants' motion, "the Court
14 may treat the facts asserted by Defendant as 'undisputed for the purposes of the motion.'" (*Id.*, p.
15 2) (citing Fed. R. Civ. P. 56(e)(2)). Alternatively, "if Plaintiff fail[ed] to oppose the motion or file
16 a statement of non-opposition, the Court may recommend that this case be dismissed for failure to
17 prosecute and failure to comply with a court order." (*Id.*) The Court also noted that, "the Court
18 will not impose any sanctions or treat the facts asserted by Defendants as undisputed at this time.
19 Instead, the Court will give Plaintiff one more opportunity to file a response." (*Id.*)

20 Plaintiff's thirty-day deadline has passed, and Plaintiff has once again failed to file an
21 opposition or a statement of non-opposition.¹ Accordingly, the Court will recommend that this
22 action be dismissed, without prejudice, for failure to comply with a court order and to prosecute
23 this case. The Court will also recommend that all outstanding motion(s) be denied as moot.

24 "In determining whether to dismiss a[n] [action] for failure to prosecute or failure to
25 comply with a court order, the Court must weigh the following factors: (1) the public's interest in
26 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of

27 ¹ Plaintiff has also failed to file a scheduling and discovery statement within the Court's deadline as ordered on May
28 25, 2023. (ECF No. 47, p. 2 ("It is not clear, but it appears Plaintiff is also requesting an extension of time. Plaintiff
does not identify any deadline that he wants extended or the length of the extension he is seeking. Nevertheless, the
Court will grant Plaintiff [a thirty day] extension of time to file his scheduling and discovery statement.")).

1 prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the
2 public policy favoring disposition of cases on their merits.” *Pagtalunan v. Galaza*, 291 F.3d 639,
3 642 (9th Cir. 2002) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

4 ““The public’s interest in expeditious resolution of litigation always favors dismissal.” *Id.*
5 (quoting *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999)). Accordingly, this
6 factor weighs in favor of dismissal.

7 As to the Court’s need to manage its docket, “[t]he trial judge is in the best position to
8 determine whether the delay in a particular case interferes with docket management and the
9 public interest.... It is incumbent upon the Court to manage its docket without being subject to
10 routine noncompliance of litigants....” *Id.* Here, Plaintiff’s repeated failure to respond to
11 Defendants’ motion for summary judgment, despite being ordered to do so by the Court, is
12 consuming the Court’s limited time. This failure is delaying this case and interfering with docket
13 management. Therefore, the second factor weighs in favor of dismissal.

14 Turning to the risk of prejudice, “pendency of a lawsuit is not sufficiently prejudicial in
15 and of itself to warrant dismissal.” *Id.* (citing *Yourish*, 191 F.3d at 991). However, “delay
16 inherently increases the risk that witnesses’ memories will fade and evidence will become stale,”
17 *id.* at 643, and it is Plaintiff’s failure to file to respond to Defendants’ motion for summary
18 judgment that is causing delay. Therefore, the third factor weighs in favor of dismissal.

19 As for the availability of lesser sanctions, given that Plaintiff has stopped prosecuting this
20 case, despite being warned of possible dismissal, there is little available to the Court that would
21 constitute a satisfactory lesser sanction while protecting the Court from further unnecessary
22 expenditure of its scarce resources. Considering Plaintiff’s *in forma pauperis* application, it
23 appears that monetary sanctions are of little use. And as Plaintiff has stopped prosecuting this
24 case, excluding evidence would be a meaningless sanction. Additionally, because the dismissal
25 being considered in this case is without prejudice, the Court is stopping short of using the harshest
26 possible sanction of dismissal with prejudice.

27 Finally, because public policy favors disposition on the merits, this factor weighs against
28 dismissal. *Id.*

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1 After weighing the factors, the Court finds that dismissal without prejudice is appropriate.
2 Accordingly, the Court HEREBY RECOMMENDS that:

- 3 1. This case be dismissed, without prejudice, because of Plaintiff's failure to comply with a
4 court order and prosecute this case; and
- 5 2. All outstanding motion(s) be denied as moot; and
- 6 3. The Clerk of Court be directed to close this case.

7 These findings and recommendations will be submitted to the United States district judge
8 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within fourteen
9 (14) days after being served with these findings and recommendations, Plaintiff may file written
10 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
11 Findings and Recommendations." Plaintiff is advised that failure to file objections within the
12 specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834,
13 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

14 IT IS SO ORDERED.

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16 Dated: July 12, 2023

17 /s/ Eric P. Shoup
18 UNITED STATES MAGISTRATE JUDGE
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